STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Attorney Discipline Board

Grievance Administrator,
Attorney Grievance Commission,
State of Michigan,

Petitioner-Appellant, Supreme Court No. 127547
ADB Case No. 01-55-GA

-vs-

Geoffrey N. Fieger, P-30441,

Respondent-Appellee.
_____/

APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS INVOLVED

I **CAN THE ATTORNEY DISCIPLINE BOARD DECLARE A RULE OF PROFESSIONAL CONDUCT TO BE UNCONSTITUTIONAL?**

Attorney Discipline Board answers, "YES."

Petitioner-Appellant answers, "NO."

II **DID RESPONDENT'S REMARKS CONCERN A PENDING CASE?**

Attorney Discipline Board answers, "NO."

Petitioner-Appellant answers, "YES."

III **IS NONFACTUAL NATURE OF RESPONDENT'S REMARKS RELEVANT TO CHARGES OF PROFESSIONAL MISCONDUCT UNDER EITHER MRPC 3.5(c) OR 6.5(a)?**

Attorney Discipline Board answers, "YES."

Petitioner-Appellant answers, "NO."

IV **DOES MRPC 3.5(c) OR 6.5(a) UNCONSTITUTIONALLY RESTRICT RESPONDENT'S FIRST AMENDMENT RIGHTS?**

Attorney Discipline Board answers, "YES."

Petitioner-Appellant answers, "NO."

STATEMENT OF FACTS

On two occasions in August 1999, Respondent Geoffrey N. Fieger (Respondent), during the live broadcast of a talk radio show he hosted on WXYT-AM in Southfield, Michigan, made comments about Chief Judge Richard A. Bandstra, Judge Jane E. Markey and Judge Michael J. Talbot of the Michigan Court of Appeals. Respondent's comments were prompted by a decision these judges filed on August 20, 1999, vacating a judgment Respondent had obtained for his client in a medical malpractice action, and remanding the case to the circuit court for entry of a judgment [notwithstanding the verdict] for the defendants. *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278; 602 NW2d 854 (1999).

In his live broadcast of August 23, 1999, Respondent said, "Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too." Respondent also said, referring to his client, "He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses."

Two days later in his live broadcast of August 25, 1999, Respondent called Chief Judge Bandstra, Judge Markey, and Judge Talbot "three jackass Court of Appeals judges." Then, after another member of the broadcast team used the word "innuendo" about a section of the appellate decision, Respondent said, "I know the only thing that's in their endo should be a large, you know, plunger

about the size of, you know, my fist." Finally, Respondent said, "They say under their name, Court of Appeals Judge, so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think was, is now Judge Markey, she's on the Court of Appeals."

Respondent, who has been a licensed attorney in Michigan since 1979, was charged with professional misconduct in a formal complaint filed with the Attorney Discipline Board on April 16, 2001. (Appellant's Appendix, p 1a). Respondent answered and denied the charges. (Appellant's Appendix, p 6a). Relevant rule violations alleged in the formal complaint are MRPC 3.5(c) and 6.5(a).

MRPC 3.5(c) provides that a lawyer shall not "engage in undignified or discourteous conduct toward the tribunal." MRPC 6.5(a), in pertinent part, provides that a lawyer "shall treat with courtesy and respect all persons involved in the legal process."

Respondent pleaded no contest to both rule violations in exchange for a conditional reprimand and the opportunity to appeal their constitutionality. (Appellant's Appendix, p 10a). An Order of Reprimand was entered by the hearing panel. (Appellant's Appendix, p 17a).

Respondent appealed to the Attorney Discipline Board. On November 8, 2004, the Board vacated the order of reprimand and dismissed the formal complaint. (Appellant's Appendix, p 20a).

Petitioner-Appellant's application for leave to appeal was granted by the Supreme Court on May 27, 2005.

STANDARD OF REVIEW

All of the issues presented for appeal involve questions of law to be reviewed *de novo*. *Terrien v Zwit*, 467 Mich 56; 648 NW2d 602 (2002).

ARGUMENT

I

THE BOARD DOES NOT HAVE THE POWER TO DECLARE A RULE OF PROFESSIONAL CONDUCT UNCONSTITUTIONAL.

In his answer to the grievance administrator's application for leave to appeal, Respondent denied that the Board had held either one of the courtesy rules to be unconstitutional. Even the Board's plurality opinion, after explicitly claiming the power of constitutional review, finessed its exercise of this review and professed to be giving the courtesy rules simply a "narrowing construction." (Board Op, p 15). Notwithstanding its reticence, the only reasonable construction of the Board's opinion is that it held MRPC 3.5(c) and 6.5(a) (collectively, "courtesy rules") to be unconstitutional as applied to Respondent.

Whatever confusion exists in this regard can be traced to the three-two-three split among the Board's eight members who participated in the decision. The three members (St. Antoine, Hampton, and Lennon) who comprise the plurality opinion first addressed whether the plain language of MRPC 3.5(c) and 6.5(a) covered Respondent's conduct. After determining that the courtesy

rules did not, they then continued [1] with a fourteen-page analysis of First Amendment and vagueness/overbreadth caselaw before concluding:

> We hold that the plain language of MRPC 3.5(c) and 6.5(a) does not apply to the statements for which discipline is sought in this case. We also believe an interpretation of these rules that would punish nonfactual utterances made about an appellate tribunal after issuance of its opinion would be unconstitutional. None of the *Gentile* considerations regarding the paramount importance of a fair trial in a particular proceeding are present here. Moreover, vagueness problems are also present. Accordingly, we reiterate our conclusion that the Michigan Supreme Court would not approve the Administrator's construction of these rules even if it were supported by the plain text. (Board Op, p 29).

Three of the Board members (Martell, Steffens, and Combs, Jr.) dissented from the plurality opinion. The three dissenters found that Respondent's conduct came within the plain language of the courtesy rules, that the rules did not violate the First Amendment, and that the rules were neither unconstitutionally overbroad nor vague.

The two remaining Board members (McAllister and Baumann) dissented in part from, and concurred in part with, the plurality opinion. These two members agreed with the other three dissenters that the plain language of MRPC 3.5(c) and 6.5(a) covered Respondent's conduct. However, they also agreed with the portion of the plurality opinion "holding that the comments at issue fall

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[1] Having determined that Respondent's conduct was not covered by the plain language of the courtesy rules, it was unnecessary to consider the constitutional issues, *Rinaldi v Civil Service Comm'n*, 69 Mich App 58; 244 NW2d 609 (1976); strictly speaking, the balance of the plurality opinion is *dicta*.

within the protection of the First Amendment." (Concurring & Dissenting Board Op, p 1).

The upshot of all three opinions is that a majority of the Board members, five of eight, found Respondent's conduct to have violated the plain language of MRPC 3.5(c) and 6.5(a). If the Board had confined its review strictly to the question whether Respondent's conduct violated the plain language of the courtesy rules, then the hearing panel's order of reprimand should have been affirmed. Absent the constitutional grounds, in other words, the Board had no basis on which to reverse the hearing panel.

Generally speaking, a statute may be held unconstitutional either because it is invalid "on its face" or because it is unconstitutional "as applied" to a particular set of circumstances. *Women's Medical Professional Corp v Voinovich*, 130 F3d 187 (CA6, 1997). Given its reversal, the Board necessarily found that the courtesy rules were unconstitutional as applied to Respondent.

The Board has never before in its twenty-seven-year history declared a rule of professional conduct to be unconstitutional, but it has in several prior cases assumed it could, most recently in *Grievance Administrator v Cheryl Warren*, 01-16-GA (ADB 2003). The Sixth Circuit Court of Appeals once thought that the Board had such authority, in *Fieger v Thomas*, 74 F3d 740 (CA6, 1996), at least until its unpublished decision a year later in *Patmon v Thomas*, 114 F3d 1188 (CA6, 1997), when the court seemingly retreated from that position. Even the grievance administrator on occasion has argued that the Board has the power of constitutional review. Federal decisions on state law are not binding but only persuasive,

Continental Motors Corp v Muskegon, 365 Mich 191; 112 NW2d 429 (1961), and any previous concessions by the grievance administrator are insufficient to expand the Board's powers. See, e.g., *Kita v Matuszak*, 21 Mich App 421; 175 NW2d 551 (1970).

The Supreme Court has yet to decide this issue. Such case law as there is from the Supreme Court on the powers of administrative agencies does not support the proposition that the Board can declare a rule of professional conduct to be unconstitutional.

In *State Bar* v *Estes*, 390 Mich 585; 212 NW2d 903 (1973), the Supreme Court deemed the procedures of the State Bar Grievance Board (the Board's immediate predecessor) to be quasi-judicial rather than primarily judicial. Several administrative law decisions by the Supreme Court dating back to 1942, of which *Wikman v Novi*, 413 Mich 617; 322 NW2d 103 (1982), is the latest, hold that "an agency exercising quasi-judicial power does not undertake the determination of constitutional questions or possess the power to hold statutes unconstitutional." *Id.* at 646-47.

If the Board possesses an unrestricted power of constitutional review, then it is possible that the three layperson members (voting together as a majority of a bare five-member Board quorum) could overturn a rule of professional conduct promulgated by the Justices of the Supreme Court.

The Board unquestionably has some power to use constitutional principles in its adjudications. For example, the Board could consult constitutional law in order to employ the canon of constitutional avoidance as an aid in choosing between competing plausible interpretations of a rule of professional conduct. Doing

so, of course, would not involve the exercise of the power of constitutional review, but its avoidance. See, e.g., *Clark v Martinez*, _____ US _____; 125 S Ct 716; 160 L Ed 2d 734 (2005). As the Board's plurality opinion notes, MCR 9.113(B)(3) authorizes the Board and its hearing panels, if requested by the grievance administrator, to decide whether an attorney can refuse on constitutional grounds to answer a request for investigation. However, trying to extrapolate a broad power of constitutional review from the extremely specific power granted by MCR 9.113(B)(3), as the Board's plurality opinion does, ignores the maxim of construction that to express or include one thing implies the exclusion of the other, or of the alternative. *Alan v Wayne*, 388 Mich 210; 200 NW2d 628 (1972).

The court rules allow a constitutional challenge to a rule of professional conduct to be pursued by a respondent in two different ways. Either a respondent can preserve the issue in a separate record before the hearing panel and the Board, see, e.g., *People v Walker*, 450 Mich 917; 542 NW2d 866 (1995)(opinion of Levin, J.), and then seek leave to appeal from the Supreme Court under MCR 9.122(A)(1) and MCR 7.302(B)(6). Or, a respondent can file an original complaint in the Supreme Court for superintending control under MCR 7.304(A).

II

THE BOARD ERRED BY ASSUMING THAT RESPONDENT'S REMARKS INVOLVED A COMPLETED CASE, AND BY CREATING A SEPARATE CATEGORY OF PROTECTED SPEECH FOR OPINION, SATIRE, AND HYPERBOLE.

Aside from whether the Board even has the power of constitutional review, its analysis of the constitutional issues is erroneous in two respects. First, the Board assumed that the issuance of the *Badalamenti* opinion by the Court of Appeals immediately terminated those legal proceedings; in fact, *Badalamenti* was a pending case when Respondent made his remarks and it remained pending for another nineteen months. Second, the Board misinterpreted First Amendment case law to create a new category of protected speech for opinion, satire, and hyperbole.

A. Respondent's Remarks Involved A Pending Case.

Under the court rules then in effect, a Court of Appeals decision did not become effective until after the expiration of the time for filing an application for leave to appeal to the Supreme Court, or, if such an application was filed, after the disposition of the case by the Supreme Court. MCR 7.215(E)(1)(a). The time for filing an application in the Supreme Court for leave to appeal was twenty-one days from the date of filing or of mailing of the opinion appealed from, MCR 7.302(C)(2)(a) and (b); or, if a timely motion for rehearing was filed, twenty-one days from the date of mailing of an order denying the motion. MCR 7.302(C)(2)(c).

The Court of Appeals issued its *Badalamenti* decision on August 20, 1999. Three days later, and again five days later, Respondent

broadcast his remarks on his radio program. Respondent then filed a timely motion for rehearing in *Badalamenti* on September 10, 1999, and, after that was denied on November 11, 1999, filed a timely application for leave to appeal in the Supreme Court on December 1, 1999. Respondent's application was not denied by the Supreme Court until March 21, 2001. 463 Mich 980; 624 NW2d 186 (2001).

A case is "pending" until there is a final determination on appeal. *Bull v Bull*, 109 Mich App 328; 311 NW2d 768 (1981) (overruled on other grounds in *In re Clancy*, 442 Mich 648; 502 NW2d 649 (1993)). Even after a decision by the Court of Appeals, a case is still pending during the time when it can be appealed to the Supreme Court. *Ford Motor v Jackson*, 47 Mich App 700; 209 NW2d 794 (1973). Respondent's radio broadcasts clearly took place while *Badalamenti* was pending.

It is significant for First Amendment purposes that Respondent's remarks concerned a pending case because that is precisely when a lawyer is most vulnerable to speech regulations. See, e.g., *Gentile v State Bar of Nevada*, 501 US 1030; 111 S Ct 2720; 115 L Ed 2d 888 (1991). The Board's plurality opinion, however, said that Respondent's remarks were made "outside the context of a pending proceeding." (Board Op. 22). The plurality opinion rejected the idea that a case could be "pending," within the meaning of *Gentile*, beyond the trial court level. Appellate judges, according to the Board, "will not be swayed by a lawyer's brickbats." (Board Op, p 20, n 17).

Justice Holmes, in *Patterson v Colorado*, 205 US 454; 27 S Ct 556; 51 L Ed 879 (1907), was less sanguine about the reaction of

judges to "brickbats." *Patterson* involved an appeal of a contempt arising out of published articles and a cartoon criticizing the motives and conduct of the Colorado Supreme Court in cases pending before it. "The theory of our system," said Justice Holmes, "is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." 205 US at 462.

Even though Justice Holmes conceded that jurors were more likely than judges to have their judgment affected, he believed "what is true with reference to a jury is true with reference to a court... When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied." *Id.* at 462-3.

If all the appellate remedies had been exhausted in *Badalamenti* and the case was really over, there is no question that Respondent would have been subject to fewer ethical restrictions had he chosen to comment on the case. Michigan lawyers historically have enjoyed a wide latitude in criticizing the official actions of any of the branches of government. *In re Estes*, 355 Mich 411; 94 NW2d 916 (1959). "Courts are not, and should not be, immune to criticism." *Id.* at 414. The grievance administrator has never suggested otherwise in this or in any other prosecution. But when a case is pending, as *Badalamenti* was, the permissible latitude of criticism shrinks. A pending case is the least appropriate setting in which to administer the usual First

Amendment antidote of countering poisonous speech with more speech.

The notion that the "best test of truth is the power of the thought to get itself accepted in the competition of the market" comes from Justice Holmes's dissent in *Abrams v United States*, 250 US 616, 630; 40 S Ct 17; 63 L Ed 1173 (1919). Twenty years later, George Orwell, fearing such things as the "sinister possibilities of the radio," declared "the truth is great and will prevail [is] a prayer rather than an axiom." [2] His skepticism is supported by more contemporary psychological research confirming the extent to which people continue to rely on misinformation even if they demonstrably remember and understand a subsequent retraction. Nonetheless, even if good ideas were guaranteed to always drive out bad ones in a kind of reverse Gresham's Law, the boundaries of the Holmesian marketplace cannot ethically embrace pending cases.

Assuming, *arguendo*, that Respondent's remarks amount to speech in the First Amendment sense, the judicial targets of his remarks were not at liberty to counter with their own speech while *Badalamenti* was pending because doing so could expose them personally to charges of ethical violations. *In re Hocking*, 451 Mich 1; 546 NW2d 234 (1996); Canon 3(A)(6). Moreover, "regardless of the merits of the dispute," this Court has warned that, "a media war of words may erode public confidence in the judiciary." *Hocking* at 18. In addition to any erosion of public confidence in the judiciary, such a media war would likely also spawn motions for recusal and introduce a needless layer of inefficiency in the

[2] An Age Like This 1920-1940, The Collected Essays, Journalism and Letters of George Orwell, vol 1, 1968, p 376, Harcourt, Brace, Jovanovich (S. Orwell and I. Angus, ed).

appellate process.

The "more speech is better" approach is just not suitable for pending cases. Pending cases are different, and a serious constitutional analysis has to account for those differences.

B. Nonfactual Utterances Are Not A Separate Category Of Protected Speech Under The First Amendment.

The Board's plurality opinion held that it would be unconstitutional to punish an attorney's nonfactual utterances about the decision of an appellate tribunal. Treating opinions, satire, and hyperbole as if they constitute a separate category of protected speech is not justified by First Amendment case law.

Affording legal protection to nonfactual utterances is a doctrine that originated in defamation law. An action for defamation is intended to vindicate a person's reputation. *Meyer v Hubbell*, 117 Mich App 699; 324 NW2d 139 (1982). Because opinions, satire, and hyperbole do not assert facts, no reasonable person could believe that the remarks are true and think less of the target of those remarks. The target's reputation, in other words, cannot be damaged by nonfactual utterances.

Importing the doctrine of nonfactual assertions into disciplinary law makes sense only for rules of professional conduct which are concerned with truthful communications or with a person's reputation or integrity. For example, if a lawyer was prosecuted for false statements concerning the qualifications or integrity of a judge, or if a judicial candidate was prosecuted for false communications, it would be relevant that the statements or

communications in question were opinions that could not provably be false. The Supreme Court recognized this in *In Re Chmura (After Remand)*, 464 Mich 58; 626 NW2d 876 (2001) (*Chmura II*), when it pointed out that "the language used in Canon 7(B)(1)(d) [the basis of the Judicial Tenure Commission's prosecution] has its roots in defamation law." *Id.* at 70. These roots give relevance to the doctrine of rhetorical hyperbole in *Chmura II*. Any relevance disappears when the doctrine is taken outside the defamation context and used to analyze alleged violations of disciplinary rules which do not involve elements of untruthfulness or damage to someone's reputation.

MRPC 3.5(c) and 6.5(a) both reflect the interests of the Supreme Court in having lawyers it has licensed adhere to standards of civility. Neither of these rules requires showing that false statements were made or that a person's integrity was impugned. Whether Respondent's comments are nonfactual is irrelevant; the issue is whether they were discourteous.

III

RESPONDENT'S REMARKS ARE NOT PROTECTED BY THE FIRST AMENDMENT.

Disciplinary proceedings for pure incivility are not unique to Michigan. Wisconsin, for instance, disciplined a lawyer for violating his oath as an attorney to refrain from "offensive personality." *In re Beaver*, 181 Wis 2d 12; 510 NW2d 129 (1994). It does appear, however, that Michigan is the only state with rules of professional conduct requiring lawyer courtesy as an end in itself, regardless of whether the conduct degrades or disrupts a

tribunal.

The nonutilitarian nature of Michigan's courtesy rules suggests that state and federal case law regarding a lawyer's freedom of speech can provide only a limited guidance. One needs to beware of constitutional comparisons which "are at once too simple, too general, and too inaccurate to be determinative. Where the line shall be placed rests, not on such generalities, but on the concrete clash of particular interests..." *Thomas v Collins*, 323 US 516, 531; 65 S Ct 315; 89 L Ed 430 (1945).

A. Respondent's Remarks Do Not Qualify As Speech.

Given the general consensus that Respondent's remarks were "base," "vile," "destructive," and "revolting," (Board Op, p 29), the logical starting point for a free speech analysis should be whether Respondent's remarks even qualify as speech in a constitutional sense. The Constitution protects communications, not words. *Martin v Parrish*, 805 F2d 583 (CA5, 1986).

It has long been recognized that certain classes of speech are outside the protective scope of the First Amendment. Political expression, of course, "occupies the core of the protection afforded by the First Amendment," *In re Chmura*, 461 Mich 517, 532; 608 NW2d 31 (2000) (*Chmura I*). At the periphery, but still protected to a lesser extent, is commercial speech. *Bates v Arizona*, 433 US 350; 97 S Ct 2691; 53 L Ed 2d 810 (1977). This protective scope has its limits, however, because the First Amendment, while fundamental, is not absolute. *Ashcroft v ACLU*, 535 US 564; 122 S Ct 1700; 152 L Ed 2d 771 (2002).

"There are," said the United States Supreme Court in *Chaplinsky v New Hampshire*, 315 US 568, 571-2; 62 S Ct 766; 86 L Ed 1031 (1942), "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." The court in *Chaplinsky* continued:

> These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' [*Id.* at 572].

The First Amendment's primary aim is the full protection of speech upon issues of public concern. *Connick v Myers*, 461 US 138; 103 S Ct 1684; 75 L Ed 2d 708 (1983). Controversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection. *Dambrot v Central Michigan Univ*, 55 F3d 1177 (CA6, 1995). Speech is considered to be upon issues of public concern to the "extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives." *Id.* at 1189. A "resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution..." *Cantwell v Connecticut*, 310 US 296, 309-10; 60 S Ct 900; 84 L Ed

1213 (1940).

The authorities relied on by the Board's plurality opinion such as *Chmura II*, *Gentile*, and *Standing Committee on Discipline v Yagman*, 55 F3d 1430 (CA9, 1995), all involved attorney speech which would be classified as political expression, speech which occupies the core of the protection afforded by the First Amendment.

Chmura II, on which the Board's plurality opinion so heavily relies, involved statements by a judicial candidate in his campaign literature. Respondent, on the other hand, was not a candidate for office, his remarks were not made during a political campaign and they did not relate to any issue of public concern. Respondent's utterances had no communicative value and they do not qualify as speech for purposes of the First Amendment.

B. The Supreme Court Has A Substantial Interest In Requiring That Licensed Lawyers Conduct Themselves Courteously.

States bear a special responsibility for maintaining standards among members of the licensed professions. *Williamson v Lee Optical Co*, 348 US 483; 75 S Ct 461; 99 L Ed 563 (1955). A state's interest in regulating lawyers is especially great "since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v Virginia State Bar*, 421 US 773; 95 S Ct 2004; 44 L Ed 2d 572 (1975).

Chief Justice Burger, writing for the court in *In re Snyder*, 472 US 634, 644-45; 105 S Ct 2874; 86 L E2d 504 (1985), described some of the powers which come with that office:

> As an officer of the court, a member of the bar enjoys singular powers that others do not

> possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as a witness in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

It is understandable, therefore, that a license to practice law requires more than just a demonstration of the applicant's technical proficiency. Applicants for admission to the State Bar of Michigan also must "possess good moral character," Rules for the Board of Law Examiners, 1(B), and must generally undergo an investigation by a Character and Fitness Committee. State Bar Rule 15, §1.

An oath of office is administered to all applicants to whom a certificate of qualification has been issued by the Board of Law Examiners in which they swear, among other things, "to maintain the respect due to courts of justice and judicial officers...abstain from all offensive personality...and conduct [themselves] personally and professionally in conformity with the high standards of conduct imposed on members of the bar as conditions for the privilege to practice law in this State." State Bar Rule 15, §3(1).

In Michigan, the responsibility for supervising lawyers rests with the Supreme Court. Const 1963, art VI, §5. "The license to practice law in Michigan is...a continuing proclamation by the

Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court." MCR 9.103(A). "The public should be able to expect and receive a high standard of ethical conduct from those who have been admitted to the practice of law. Indeed, the standard of conduct should be above that of the 'average' person." *In re Markowitz*, 393 Mich 6, 11; 222 NW2d 504 (1974).

It is implied throughout the Board's plurality opinion that the courtesy rules exist only to protect against the disruption of a tribunal. While this interest is important, it is certainly not the only or even primary one which is served by MRPC 3.5(c) and 6.5(a). The courtesy rules vindicate the Supreme Court's interest in the good moral character of the lawyers it has licensed to be officers of the court. A recent attorney reinstatement case from North Dakota, *In re Hoffman*, 704 NW2d 810 (ND 2005), illustrates this point.

Randall Hoffman was suspended from the practice of law in North Dakota for one year. During the period of his suspension, Mr. Hoffman engaged in disparaging and demeaning communications over the internet with one of the victims of his previous misconduct. Mr. Hoffman petitioned for reinstatement. When his petition was denied by the North Dakota Disciplinary Board, in part because of his conduct towards the victim, he appealed and argued that his internet communications were protected speech under the First Amendment.

As the North Dakota Supreme Court saw it, the question

presented was not so much Mr. Hoffman's freedom of speech, but whether his "propensity to unreasonably react against any one whom he believes opposes him reveals his lack of responsibility, which renders him unfit to practice law." *Id.* at 815. "There can be," said the court in *Hoffman* affirming the denial of the reinstatement petition, "such an abuse of the freedom of speech and liberty of the press as to show that a party is not possessed of 'good moral character.'" *Id.*

The extraordinary protections of the First Amendment carry with them, even as to members of the press, something in the nature of a fiduciary duty to exercise the protected right responsibly. *Nebraska Press Ass'n v Stuart*, 427 US 539; 96 S Ct 2791; L Ed 2d (1976). A lawyer's fiduciary obligation to exercise rights protected by the First Amendment are at least as great, if not greater, than a member of the press. An irresponsible exercise by a lawyer of those rights is a legitimate ground for professional discipline.

C. The Courtesy Rules Have Merely An Incidental Effect On Attorney Speech.

The courtesy rules do not prohibit an attorney from criticizing a court's decision, pending or not. MRPC 3.5(c) and 6.5(a) are directed at discourtesy, not at a particular point of view. They are entirely compatible with the bedrock First Amendment principle that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. *Texas v Johnson*, 491 US 397; 109 S Ct 2533; 105 L Ed 2d 342 (1989). MRPC 3.5(c) and 6.5(a) do not prohibit lawyers

from expressing offensive or disagreeable ideas; they simply prohibit the expression of ideas in an offensive or disagreeable, i.e., discourteous, manner.

A lawyer who chooses to criticize a court's decision also chooses how to cast his criticism. "There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *FCC v Pacifica Foundation*, 438 US 726, 743, n 18; 98 S Ct 3026; 57 L Ed 2d 1073 (1978). The Board's lead opinion touched on this point in its conclusion:

> [A]n advocate can challenge authority without trashing the individuals and institutions that uphold the rule of law in our society. The finest lawyers use reasoned argument, eloquence, even humor or true satire to make their points. In this instance, Respondent's arsenal is bereft of these attributes. Lacking wit or cleverness, Respondent lashed out with comments that were base, vile, destructive and, in the end, quite ineffective. His childish scorched-earth tactics served no one well. [Board Op, p 29].

It is important to remember that Respondent was charged with misconduct not because he lacked wit and cleverness, but because of his scorched-earth tactics. They may have been ineffective and served no one well, but his conduct and the choices he made call into question whether he has the moral character demanded of every lawyer licensed in this state.

The courtesy rules are content-neutral. If they happen to restrict First Amendment rights in any way, the restriction is merely incidental. Respondent's remarks do not amount to "speech," but they could be considered conduct with an expressive element. The United States Supreme Court in *United States v O'Brien*, 391 US

367; 88 S Ct 1673; 20 L Ed 2d 672 (1968), imposed an intermediate level of scrutiny for content-neutral regulations of conduct with an expressive element. A court applying the *O'Brien* test must examine whether:

> 1) the regulation is within the constitutional power of the government;
>
> 2) the regulation furthers an important or substantial government interest;
>
> 3) the government interest is unrelated to the suppression of free expression; and
>
> 4) the incidental restriction on First Amendment freedom is no greater than is essential in furtherance of that interest.

Michigan's courtesy rules satisfy all four prongs. The Supreme Court has the authority to promulgate rules of professional conduct for the lawyers it licenses. *In re Schlossberg*, 388 Mich 389; 200 NW2d 219 (1972). These courtesy rules further an important or substantial interest of the Supreme Court in ensuring that the lawyers whose fitness they proclaim have the moral character necessary to act as officers of the court. The courtesy rules do not suppress any free expression; they only require that such expression not be discourteous. Finally, the incidental restrictions on lawyer free speech is no greater than is essential in furtherance of the Supreme Court's interest.

D. The Supreme Court's Interest In Lawyer Civility Outweighs Respondent's Interest In Engaging In Discourtesy.

Although the Supreme Court's relationship with the lawyers it licenses is not literally one of employer/employee, "there are

through tradition and the [ethical rules] bonds which may be likened to such a relationship." *Committee on Legal Ethics v Douglas*, 179 W Va 490, 496; 370 SE2d 325 (1988). The analogy, though imperfect, provides an alternative approach to analyzing the First Amendment issue.

In *Pickering v Board of Education,* 391 US 563; 88 S Ct 1731; 20 L Ed 2d 811 (1968), the United States Supreme Court agreed that public employees do not, by virtue of that employment, relinquish their First Amendment right to comment on matters of public interest. The Court also recognized that the state's interest as an employer in regulating the speech of its employees differs significantly from its interest in regulating the speech of the citizenry in general. The problem, according to *Pickering*, was arriving "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 US at 568.

Pickering was clarified further in *Connick, supra*, where the Court held that it was unnecessary to scrutinize the reasons for a government employee's discharge if the speech in question was not "on a matter of public concern." 461 US at 146. Interests are balanced only after a court determines that the disciplined or discharged employee's speech was protected speech within the meaning of the First Amendment.

Even if Respondent's remarks could be considered speech for First Amendment purposes, thereby satisfying the first step of the

Pickering/Connick test, a subsequent balancing of interests would clearly favor upholding the hearing panel's order. Whatever hypothetical interest might be served by allowing Respondent to engage in discourteous conduct is surely outweighed by the Supreme Court's interest in attorney civility. The courtesy rules place only a limited, voluntary burden on free speech, not an outright ban.

RELIEF

Petitioner-Appellant, Grievance Administrator, requests that the Attorney Discipline Board's Order Vacating Hearing Panel Order of Reprimand (By Consent) and Dismissing Formal Complaint dated November 8, 2004, be reversed, and that the Order of Reprimand (By Consent) entered by the Tri-County Hearing Panel #101 on January 9, 2004, be reinstated.

Dated: November 23, 2005

Respectfully submitted,
By:

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